Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-515

In The
Supreme Court of The United States

OCTOBER TERM, 1980

W. C. YORK,

Petitioner,

v.

FEDERAL HOME LOAN BANK BOARD

AND

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,

Respondents,

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF RALEIGH

Intervenor-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF STATE SAVINGS AND LOAN SUPERVISORS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Now comes the National Association of State Savings and Loan Supervisors ("NASSLS") and moves that this Court permit it leave to file a brief in this matter as *amicus curiae* in support of respondents, and in support thereof say as follows:

1. The movant herein is an association composed of the officials of the several states whose responsibility it is to regulate state chartered savings and loan institutions in their respective states or territories.

2. The movant is established to represent state savings and loan supervisors. As the only organization representing state savings and loan supervisors, NASS&LS, alone, can represent the interests of those states whose laws are being challenged in this action. Its unique perspective can aid the Court by framing from a State viewpoint, the complex issues presented by this litigation.

3. The laws of some thirty states provide for the conversion of a state chartered mutual savings and loan association to a state chartered stock savings and loan association.

4. Several state chartered, Federally insured savings and loan associations have applied for regulatory approval to convert from mutual to stock form of organization. The associations have expended substantial funds in complying with the application requirements of their state supervisor and the Federal Savings and Loan Insurance Corporation, ("FSLIC"). Were petitioner W. C. York to prevail in this action the funds advanced by state chartered savings and loan associations in pursuit of their application would be lost. The loss of such funds as well as the opportu-

nity to generate new capital funds through the sale of conversion stock could have very serious effects on the capital positions and future prospects of the several state chartered institutions.

5. In North Carolina, alone, one state chartered, guaranty insured institution has completed the conversion process. Twelve applications for conversion by North Carolina institutions are currently pending, eleven are by state chartered, FSLIC insured institutions.

6. The Movant's interest derives from its concern for the effect that the decision in this case may have on the laws of the thirty states which provide for stock conversions and the savings and loan supervisor whose sworn duty it is to uphold such laws.

7. The Movant supports the rights of an individual state to provide for stock conversion of the savings and loan associations chartered pursuant to its laws.

8. The Movant has been active on federal and state levels in analyzing and commenting on the process for stock conversion of savings and loan associations, which is the issue involved in this action.

9. The Movant desires to offer analysis as to the effect of this litigation on the thirty some states whose laws provide for stock conversions, the state savings and loan supervisors who are sworn to uphold the laws of their states, and the state chartered mutual associations which have applied for regulatory approval to convert from mutual to stock form of organization.

WHEREAS, the Movant prays that it be given leave to file a brief as *amicus curiae* November 14, 1980.

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CERTIFICATE OF SERVICE

Copies of the foregoing petition have been mailed to Mr. Harvey Simon, Office of General Counsel, Federal Home Loan Bank Board, 1700 G Street, N.W., Washington, D.C. 20552; Mr. Irving Like, 200 N. Main Street, Babylon, New York 11702; Mr. Wade H. McCree, Solicitor General, Department of Justice, Washington, D.C. 20530; and Mr. David W. Long, Poyner, Geraghty, Hartsfield & Townsend, 615 Oberlin Road, P.O. Box 10096; Raleigh, North Carolina 27605, on this 14th day of November, 1980.

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BRIEF FOR THE NATIONAL ASSOCIATION OF STATE SAVINGS AND LOAN SUPERVISORS AS AMICUS CURIAE

INTEREST of AMICUS CURIAE

The National Association of State Savings and Loan Supervisors and the individual supervisors whose responsibility it is to regulate savings and loans in the individual

states have a general interest in the manner in which the conversion question is resolved. With respect to the instant case, the issue of whether the Federal Home Loan Bank Board's action was arbitrary, capricious and an abuse of discretion is of utmost significance to state supervisors who have acted in reliance upon statutory authority. The resolution of this issue may significantly affect the extent to which the States may exercise jurisdiction within this subject matter. Thus, the principles, guidelines and methods of analysis used by the courts in resolving questions raised in this case are of paramount concern to the State supervisors joining in this brief.

SUMMARY OF ARGUMENT

The suit brought on behalf of Mr. W. C. York challenges the authority of the FHLBB, as operating head of the FSLIC, to approve the conversion of mutual associations to capital stock form of organization. The suit assumes that the FHLBB has plenary jurisdiction over the subject of stock conversion; it ignores the fact that more than thirty states have enacted laws providing for the conversion of mutual associations to capital stock form of organization. Should the line of argument advanced by the Petitioner be sustained, a grave cloud could be cast over the validity of the laws of the thirty some states which permit stock conversions.

The potentially detrimental effects of such a holding have compelled the National Association of State Savings and Loan Supervisors ("NASS&LS") to enter as *amicus curiae* in this case. NASS&LS is an organization composed of state government officials responsible for regulating state chartered savings and loan associations throughout the United States and in its territories. The members of NASS&LS have a direct interest in the outcome of this case because it may affect the ability of state supervisors to approve conversion applications.

The Petitioner alleges that the approval of conversions from mutual to stock form constitutes a taking of property without compensation. The statute in question, 12 U.S.C. §1725(j), only provides a means by which associations may raise capital through conversion. A stock conversion is not a taking of property without just compensation. No ownership rights are taken. The ownership rights are fully protected and, in fact, actually enhanced in economic value through a complete set of regulations. Constitutionally ordained due process rights are always protected by requiring that stock conversions must, under state and federal law, be approved by an informed majority of the mutual depositors and borrowers. In addition, the fairness of the plan of conversion to members of state mutual associations is further assured by the requirement that the plan must be passed upon by federal as well as state authorities. Further protection is afforded by the appraisal process and the liquidation account which help protect against an unconstitutional taking.

ARGUMENT

1. THE FHLBB AND FSLIC HAVE STATUTORY AUTHORITY TO APPROVE THE CONVERSION OF FEDERALLY CHARTERED MUTUAL SAVINGS AND LOAN ASSOCIATIONS TO STATE CHARTERED STOCK ASSOCIATIONS.

The Petitioner challenges the approval authority of the FHLBB and FSLIC and the manner in which it is exercised by the respective agencies. Two separate questions are involved. Each will be considered individually.

NASS&LS concurs in the view of the Court, below, concerning the FHLBB's authority to approve the conversion of federally chartered mutual to federally chartered stock associations.

It is important to note that the Petitioner does *not* challenge the statutory authority of the FSLIC to approve

the conversion of a federally chartered mutual association to a state chartered stock association. Nor does the Petitioner challenge the authority of the FSLIC to approve the conversion of a state chartered mutual association to a state chartered stock association. This authority has existed for three decades since the amendment of §5(i) of the Home Owners' Loan Act in 1948. 12 U.S.C. §1464(i).

2. THE CONVERSION PROCESS IS NEITHER ARBITRARY NOR CAPRICIOUS.

The Petitioner alleges that the approval of stock conversion by the FSLIC is *per se* arbitrary, capricious, and an abuse of discretion. The Court has said in reference to the Administrative Procedures Act standard:

> Section 706(2)(A) requires a finding that the actual notice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A) (1964 ed., Supp V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *(Citations)* Although this inquiry into the facts is to be searching and careful, the ultimate standard if reviewed is a narrow one. The court is not empowered to substitute its judgment for that of the agency. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed 2d 136, 91 S. Ct. 814 (1971).

A further explanation of the arbitrary and capricious standard appears in United States Lines, Inc. v. Federal Maritime Commission, 584 F. 2d 519, 526 (D.C. Cir. 1978).

The Court's enunciated policy as to the larger equal protection question states:

> Corrollary to the rule that a legislative classification must be reasonable if it is to comport with the equal protection guaranty is the firmly established principle that a classification which is arbitrary or capricious fatally conflicts with the guaranty. Morey v. Doud,

354 U.S. 457, 1 L. Ed 2d 1485, 77 S. Ct. 1354; Walters v. St. Louis, 347 U.S. 231, 98 L. Ed 660, 74 S. Ct. 505; Niemotko v. Md., 340 U.S. 268, 95 L. Ed 267, 71 S. Ct. 325; Hartford Steamboiler Inspection and Insurance Company v. Harrison, 301 U.S. 459, 81 L. Ed 1223, 57 S. Ct. 838; Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 183, 81 L. Ed 109, 57 S. Ct. 139.

A classification, in order that it may not violate the constitution and guaranty as to equal protection of the laws, is that the classification must not be capricious or arbitrary but must be reasonable and natural, and must have a rational basis. New York Rapid Transit Corp. v. N. Y., 303 U.S. 573, 82 L. Ed 1024, 58 S. Ct. 721, *reh den.*, 304 U.S. 588; 82 L. Ed 1548, 58 S. Ct. 939; Colgate v. Harvey, 296 U.S. 404, 80 L. Ed 299, 56 S. Ct. 252; Nicole v. Ames, 173 U.S. 509, 43 L. Ed 786, 19 S. Ct. 522; Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 84 L. Ed 744, 60 S. Ct. 523.
16 AM. JUR. 2d *Constitutional Law* §§ 498-499.

No decision since Morey v. Doud in 1957 has invalidated economic regulation legislation as arbitrary or capricious under the equal protection clause. In the Sunday Closing Laws case, McGowan v. Md., 366 U. S. 420, 6 L. Ed 2d 393, 81 S. Ct. 1101 (1961), Chief Justice Warren wrote:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

In a case involving a Kansas statute prohibiting debt adjusting, Justice Black cited earlier views:

In the face of our abandonment of the use of the "vague contours" of the Due Process Clause to nullify laws which a majority of the courts believed to be economically unwise. . . . We refuse to sit as a "super legislature to weigh the wisdom of legislation" and we refuse to go back to the time when courts used the due process laws "to strike down state laws, regulatory of business and industrial conditions because they

> may be unwise, improvident, or out of harmony with a particular school of thought" . . . . Whether the legislature takes for its text book Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. Ferguson v. Skrupa, 372 U.S. 726, 10 L. Ed 2d 93, 83 S. Ct. 1028 (1963). *See also,* Williamson v. Lee Optical Co., 348 U.S. 483, 99 L. Ed 563, 75 S. Ct. 461 (1955).

According to the Court in Ferguson v. Skrupa, unless the empowering legislation which permits the agency action runs afoul it is not for the courts to strike it down. Here, the FSLIC's conversion process is established by statute and the subsequent regulations show no evidence of being arbitrary or capricious. Therefore, petitioner's proper recourse is with the Congress and not the Court.

3. THE STATES IMPOSE RIGOROUS PROTECTIONS ON THE CONVERSION PROCESS IN ADDITION TO THOSE IMPOSED BY THE FSLIC.

The conversion of state chartered, federally insured mutual savings and loan associations can, under state law, only be accomplished upon the approval of both the state savings and loan supervisor and the FSLIC, e.g. VA. CODE §6.1-195.57. Such approvals, in fact, require independent assessments by the state savings and loan supervisor. In Arkansas, for example, the Arkansas Savings and Loan Association Board must, according to the application regulation, find upon a hearing on a petition for conversion that:

> (1) The plan for conversion proposed in said petition is fair and equitable to the members of the Mutual Association;
>
> (2) The notice to the members of the meeting to consider such plan of conversion fairly sets out the rights and obligations of the members under such plan;

(3) Under the plan of conversion each member of such Association is given the right to subscribe on a pro rata basis to his interest in the Mutual Association to stock in the resultant Stock Association, provided, fractional shares shall not be required to be issued;

(4) The plan of conversion makes adequate provision for the payment to each member of his pro rata interest in any excess special or general reserves of the Mutual Association and the value of any good will of the Association;

(5) The conversion to a Stock Association will not impair the Mutual Association's financial condition or its ability to pay withdrawals of savings accounts or other creditors;

(6) The converted Stock Association would meet the requirements under this Act for the granting of an original certificate of incorporation to a Stock Association under this Act;

(7) Not more than fifteen (15%) percent of the outstanding permanent capital stock of the converted Association will be owned directly or beneficially by any one individual.

Ark. Stat. Ann. §67-1852

It is the position of *amicus* that this independent state procedure, which precedes FSLIC action, is designed to safeguard the rights of members of the mutual institution and may, in and of itself, be enough to constitute the Board's action on the approval, safe from attack as wanting in a rational basis.

In reviewing the plan of conversion, the regulatory agencies, state and federal, guarantee that the rights of mutual members are fully protected. First, federal regulations mandate full disclosure of the plan to all eligible account holders. These account holders are informed in detail of the provisions of the plan, and explanation of management's decision to adopt the plan, as well as a statement of their rights to judicial review. 12 C.F.R. §563b.4(a)(ii)(4).

The plan of conversion must be voted upon and approved by the depositors of the association. 12 C.F.R. §563b.6. This vote has been held to constitute proper authorization to alter the property rights of the depositors. Harr v. FHLBB, 557 F. 2d 747, 751 (10th Cir. 1977).

Second, eligible account holders are entitled, under federal regulations, to purchase the greater of 200 shares, one-tenth of one percent of the total offering of stock or 15 times the product of his pro rata share of qualifying depositors multiplied by the number of shares to be sold. The stock which is subscribed for by eligible account holders is of the highest preference. Stock cannot be offered to supplemental account holders, directors, officers or employees, or the public if these eligible account holders exhaust the supply of available subscription rights. 12 C.F.R. §563b.3(c)(2).

If the eligible account holder decides to exercise his right not to purchase stock, a third mandatory provision in the conversion regulations requires that a liquidation account be established. 12 C.F.R. §563b.3(c)(11).

State laws provide similar protection when state chartered associations convert to stock form. See 18 OKLA. STAT. 171, §381.50.

4. NASS&LS REJECTS PETITIONER'S ASSERTION THAT THE LEGITIMACY OF MUTUAL-TYPE INSTITUTIONS HAS BEEN CALLED INTO QUESTION.

NASS&LS does not deny the important contribution of mutual-type institutions to home finance. Petitioner's argument that the result of the Fourth Circuit's decision in the instant case would "have the effect of throwing the status of the ownership of most or all mutual-type institutions into doubt" (p. 4, Petition) is, simply, wrong. NASS&LS is unaware of any confusion about this question among its members. The confusion, it would appear exists primarily in the mind of Petitioner.

CONCLUSION

The approval by the Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation and the proper state supervisory authorities of the conversion of a mutual savings and loan to a state chartered stock savings and loan is not arbitrary, capricious or in excess of statutory authority and is not a taking of any property rights without compensation. For the reasons stated above the *amicus curiae* urge that *certiorari* be denied.

Respectfully submitted,
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